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VIA EMAIL AND FIRST CLASS MAIL

Juan Fajardo, Esquire
Assistant Regional Counsel
Office of Regional Counsel
U. S. Environmental Protection Agency - Region 2
290 Broadway
New York, NY 10007-1866

Re: Allocation for Operable Unit 2 Remedial Action
Diamond Alkali Superfund Site, Essex and Hudson Counties, New Jersey
Response of Chargeurs, Inc. to Invitation to Meet on October 13, 2017

Dear Mr. Fajardo:

This is in response to the letter, dated September 18, 2017, from Mr. Eric Wilson, Deputy Director for Enforcement and Homeland Security, Emergency and Remedial Response Division, of the U.S. Environmental Protection Agency ("EPA"), inviting Chargeurs, Inc. ("Chargeurs") to attend a meeting on October 13, 2017, at the EPA's offices in New York City to discuss the allocation process for the Operable Unit 2 Remedial Action. The letter notes that Mr. David Batson, of AlterEcho, has requested that each party's primary contact attend the October 13th meeting in person. I am the primary contact for Chargeurs. For the reasons explained in more detail below, I plan to attend the October 13th meeting on behalf of Chargeurs by teleconference rather than in person.

Since receiving the EPA's September 11, 2006 General Notice Letter, Chargeurs has consistently denied that it has any liability with respect to the Diamond Alkali Site. Attached is a copy of my October 6, 2006 letter to the EPA's former counsel, Sarah Flanagan, setting forth in detail Chargeurs' legal position that Chargeurs is not responsible for any alleged liability of its former, dissolved subsidiary, UPDW, Inc., for activities that UPDW, Inc.'s predecessor by merger, United Piece Dye Works, conducted at the Site twenty (20) years prior to Chargeurs acquiring the stock of UPDW, Inc. A copy of the Delaware Certificate of Dissolution of UPDW,

Inc., filed on January 25, 1983, is attached to my October 6, 2006 letter. EPA never responded to this letter.

As noted in the attached letter, UPDW, Inc. (successor-by-merger to United Piece Dye Works) was dissolved pursuant to the laws of the State of Delaware by filing a Certificate of Dissolution with the Delaware Secretary of State on January 25, 1983. The Delaware General Corporation Law provides that claims against a dissolved entity, or the shareholders of the dissolved entity, must be brought within three years of the dissolution. Therefore, any claim asserted against UPDW or Chargeurs would be barred by the Delaware General Corporation Law. Since I wrote the attached letter to Ms. Flanagan, the U.S. Court of Appeals for the Second Circuit issued its decision in *Marsh v. Rosenbloom*, 499 F.3d 165 (2nd Cir. 2007), in which the court found that CERCLA does not preempt the Delaware corporate wind-up statute that imposes time limits on the capacity of dissolved corporations to be sued:

> In sum, the State has not shown such a conflict between Delaware law and the congressional policy manifested in CERCLA as to lead us to conclude that Congress intended to preempt Delaware's corporate wind-up period, which protects dissolved corporations' and their former shareholders' interests in finality. CERCLA does not suggest that "the entire corpus of state corporation law is to be replaced simply because a plaintiff's cause of action is based upon a federal statute," *Burks v. Lasker*, 441 U.S. 471, 478, 99 S.Ct. 1831, 60 L.Ed.2d 404 (1979), or because it would net the government more money, *O'Melveny*, 512 U.S. at 88, 114 S.Ct. 2048, which is essentially all the State has shown here. That is not sufficient to justify preemption.

499 F.3d at 180. The Second Circuit in *Marsh* also declined to create a rule of federal common law based upon the equitable trust fund doctrine for CERCLA cases. "That the fund would win under the State's proposed [equitable trust fund] standard is not sufficient to justify adopting a rule of federal common law to expand the standard of liability for shareholder-distributees of a dissolved corporation whose predecessor owned a company that was responsible for environmental contamination." 499 F.3d at 183.

To date, the EPA has not responded to Chargeurs' legal position of no liability or to Chargeurs' related request that the EPA remove Chargeurs from the list of potentially responsible parties ("PRPs") for the Site.

I represented Chargeurs, Inc. by teleconference at the August 28, 2017 meeting. You may recall that I submitted the following written question regarding the EPA's proposed allocation framework: "What are EPA's plans and schedule for responding to legal defenses previously asserted by alleged PRPs, such as lack of successor liability?" The EPA representatives responded that the agency was not prepared to answer my question, but that my question was noted for subsequent action. Given the facts described in my October 6, 2006 letter, the Certificate of Dissolution and the compelling legal defense of no liability, Chargeurs again requests that the EPA remove Chargeurs from the list of PRPs for this Site.

It is not clear whether the proposed allocation process will provide an answer to my question. The September 18th letter notes that the October 13th meeting with Mr. Batson and AlterEcho will introduce the allocation process, including "opportunities for participating parties to comment on factors that should be part of the allocation and to contribute relevant information about themselves and other parties for use in the allocation." The letter does not indicate whether the allocation process will include a review of and response to legal defenses to liability. It instead appears that the meeting is an opportunity for the various PRP representatives to discuss the factors (e.g., waste volume, relative toxicity, etc.) that typically are considered as part of the allocation among liable parties. Chargeurs' legal defense is very specific to Chargeurs' situation. Therefore, it does not appear to be either cost-effective or appropriate for a Chargeurs representative to appear in person at the October 13th meeting simply to inform Mr. Batson and the EPA (again) that Chargeurs has a legal defense to liability. As noted above, I will participate on behalf of Chargeurs by teleconference.

Thank you for your attention to this matter. If you have any questions, please feel free to contact me.

Very truly yours,

CLARK HILL PLC

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JRB/rw
Attachment